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NOS. 57 and 58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

W. WILLARD WIRTZ, SECRETARY OF LABOR,
Petitioner

v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE UNITED STATES AND CANADA, AFL-CIO

W. WILLARD WIRTZ, SECRETARY OF LABOR,
Petitioner

v.

LOCAL UNION NO. 125, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SIXTH CIRCUITS

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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INDEX

	Page
Interest of the AFL-CIO	2
Summary of Argument	3
Argument	8
I. A Regularly Scheduled Union Election Moots a Suit By The Government Seeking To Overturn And Rerun a Prior Election	8
II. In a Title IV Lawsuit The Government Does Not Have The Power To Raise And The District Courts Do Not Have The Jurisdiction To Consider Matters Not Raised By Union Members In Their Internal Union Complaints	15
III. In No. 57 The District Court's Determination That The Government Failed To Prove That The Alleged Violation Affected The Outcome Of The Election Is Correct	42
Conclusion	47

CITATIONS

Cases:

Calhoon v. *Harvey*, 379 U.S. 134 (1964)	36
General Shoe Corp., 77 NLRB 124 (1948)	10
International Brotherhood of Teamsters v. *Wirtz*, 346 F.2d 827 (D.C. Cir., 1965)	40
Locals 545 etc., Operating Engineers v. *Wirtz*, . . . F.2d . . . , 65 LRRM 3041 (2nd Cir., July 28, 1967)	25
National Labor Relations Board v. *A. J. Tower Co.*, 329 U.S. 329 (1946)	10

National Labor Relations Board v. *Fant Milling Co.*, 360 U.S. 301 (1959) 41

National Labor Relations Board v. *Indiana & Michigan Electric Co.*, 318 U.S. 9 (1943) 41

Ray v. *Blair*, 343 U.S. 214 (1952) 15

United States v. *L. A. Tucker Truck Lines*, 344 U.S. 33 (1952) 29, 30

United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 29

Wirtz v. *Local 169 Hod Carriers*, 246 F. Supp. 741 (U.S. D.C. D. Nev., 1965) 33-34, 35

Wirtz v. *Hotel, Motel and Club Employees Union, Local 6*, . . . F.2d . . . , 65 LRRM 3032 (2nd Cir., July 28, 1967) 11-12, 25, 31-32, 46-47

Wirtz v. *Hotel and Restaurant Employees Local 705*, 63 LRRM 2315 (U.S. D.C. E.D. Mich. S.D., 1966) 34

Wirtz v. *Local 174, Musicians*, 65 LRRM 2972 (U.S. D.C. E.D. La., 1967) 33

Wirtz v. *Locals 9, etc., Operating Engineers*, 366 F.2d 911 (10th Cir., 1966) vacated as moot 387 U.S. 96 (1967) 25, 31

Wirtz v. *Locals 406, etc., Operating Engineers*, 254 F. Supp. 962 (U.S. D.C. E.D. La., 1966) 33

Wirtz v. *Locals 410, etc., Operating Engineers*, 366 F.2d 438 (2nd Cir., 1966) .. 8-9, 10, 14, 43-44, 45

Wirtz v. *Locals 450, etc., Operating Engineers*, 63 LRRM 2105 (U.S. D.C. S.D. Tex., 1966) 34

Wirtz v. *Locals 545, etc., Operating Engineers*, 366 F.2d 435 (2nd Cir., 1966) 14, 32

Wirtz v. *Local 191, Teamsters*, 321 F.2d 445 (2nd Cir., 1964) 39

Statutes:

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*:

Title IV 3, 5, 6, 7, 10, 11, 13, 29, 36, 39
Section 401 7
Section 401(e) 8, 14
Section 401 (h) 40
Section 402(a) .....
4, 5, 6, 10, 14, 15-16, 17, 19, 35, 36, 37, 38, 41, 42
Section 402(b)
4, 5, 6, 7, 14, 15-16, 17, 19, 35, 36, 37, 38, 39, 42
Section 402(c)(2) 7, 8, 14, 42, 44, 45, 47
Section 601 ..... 7, 39
Section 607 40

National Labor Relations Act, 61 Stat. 136 73 Stat. 519 29 U.S.C. 151 *et seq.*:

Section 10 11

Miscellaneous:

Cox, *The Role of Law in Preserving Union Democracy,* 72 Harv. L. Rev. 609 (1959) 24

Mitchell, *Safeguards for Union Democracy in Slovenko,* Ed., Symposium on the Labor-Management Reporting and Disclosure Act of 1959 (1961) 24

Congressional Material:

Cong. Record 7953-4, Senate, May 5, 1958 22

Cong. Record 10947-8, Senate, June 12, 1958 .. 19, 20

Cong. Record 7024-5, Senate, April 29, 1959 22

Cong. Record 16489, Senate, August 20, 1959 22
Cong. Record 19765, Senate, September 14, 1959 .. 43
Cong. Record 15707-8, House, August 12, 1959 22
Daily Cong. Record A-6573, Appendix, July 29, 1959 22
Senate Report No. 1684, 85th Cong. 2nd Sess. 11, 20-21, 25
Senate Report No. 187, 86th Cong., 1st Sess. 21-22, 38, 43
House Conference Report No. 1147, 86th Cong. 1st Sess. 22
S. 3571, 85th Cong., 2nd Sess. 17, 19
S. 3974, 85th Cong., 2nd Sess. 17, 18, 19, 38
S. 1002, 86th Cong., 1st Sess. 38
S. 1555, 86th Cong., 1st Sess. 17, 18, 19, 43
H.R. 8342, 86th Cong., 1st Sess. 17-18

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations

(AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The opinions below, jurisdiction, questions presented, and the statutory provisions involved are set out on pp. 1-3, 55-62 of the Government's brief.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 129 national and international labor organizations having a total membership of approximately fourteen million. The Federation seeks to insure that these organizations and their affiliated local unions are responsive to the needs and desires of their members. It also seeks to insure that they are effective instruments for advancing the economic and social interests of the employees they represent. Fulfillment of this dual objective calls for knowledgeable and responsible union leaders, chosen in accordance with standards and procedures freely adopted by each organization, with a minimum of interference from outside sources.

The respondents will naturally be most concerned with the particular facts of the instant cases. But much more is at stake. These cases provide this Court with its first opportunity to consider the scope and nature of the coercive powers accorded the Government by Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat 519, 29 U.S.C. 401 *et seq.*, in the critical area of union elections. Inevitably, the Court's decision will do much toward laying down the ground rules governing any attack upon a union's electoral processes. The AFL-CIO is vitally interested in seeing that this Court is aware of what its decision will mean for union democracy and for union effectiveness. We believe that our presentation will assist the Court in interpreting the Act so as best to promote both individual and organizational rights and responsibilities.

SUMMARY OF ARGUMENT

I

The Second, Third and Sixth Circuits, the three Courts of Appeals, which have passed on the question of whether a second regularly scheduled union election moots a suit by the Government seeking to overturn and rerun a prior election, have all held that the second regularly scheduled election does moot a Title IV case. These decisions are correct, for the Congressional conception of the public interest in union democracy included, as a basic component, the recognition that Government intervention in internal union affairs should be kept to a minimum. Title IV of the Act, therefore, accords the Government a narrow, albeit potent, remedial authority. Thus, in a Title IV suit, the Government must *prove* that the union election sought to be set aside was held under conditions which frustrated the expression of the membership's desires in order to provide the predicate for a district court order setting aside that election.

The Government's argument that Title IV grants it broad regulatory powers comparable to those granted to the National Labor Relations Board is untenable. The fact of the matter is that Congress specifically declined to clothe the Government with broad regulatory powers over union elections similar to those it had granted to the National Labor Relations Board. Congress's action in this regard undermines the Government's general contention that Congress feared that incumbents would perpetuate themselves in office by subtly manipulating the conduct of an election in a manner which is not "demonstrably unlawful". If Title IV had been a response to an overriding suspicion of incumbents, Congress would have accepted the propopals requiring Government-run elections rather than rejecting them. Thus the conclusion to be drawn from what was ac-

cepted and what was rejected during the legislative process is that Congress recognized that a Government-run election of union officers was strong medicine; medicine which would be counter-productive in the overall pursuit of union democracy if too liberally applied. Congress, therefore, limited this remedy to the situation where a rerun is necessary in order to replace officers whose terms of office were demonstrably the result of an election which did not reflect the membership's desires.

There is no reason to believe that the holding that a second regularly scheduled union election moots a suit to overturn and rerun a prior election would create substantial administrative problems. Of the cases instituted between 1960 and 1965 there have been only eight in which mootness has entered the picture. This very small number of cases can be expected to be reduced further as the difficult, still unresolved, legal issues pertaining to the meaning of Title IV are settled. Moreover, there is every reason to believe that the courts can expedite their consideration of these suits, if that proves necessary.

II

In the event that this Court decides that No. 58 is not moot, the Government suggests that the Court should also decide whether the District Court was correct in refusing to allow the Government to expand the case beyond the limits set by the complaining union member in his internal protest to his union. We submit that the District Court's decision in this regard was correct. Sections 402(a) and 402(b) of the Act, which control here, should be read together as a single interconnected entity which limits matters the Government has the power to raise, and the district courts have the jurisdiction to consider, in Title IV suits, to the issues which were first raised by union members with their unions.

In contrast, the Government's position is that these sections are separate and distinct and that it has *carte blanche* to introduce any issue it may choose into Title IV court litigation, if it receives a complaint from a union member who has filed an internal complaint, without regard to whether or not that issue was raised by a member's complaint filed in the internal procedures unions provide for hearing appeals as to the conduct of elections. So far as we have been able to ascertain from our research, the essence of the position we urge has been accepted in every case in the lower courts in which a written opinion discussing this point has been issued, including the opinions of both of the Courts of Appeals which have passed on the point.

The purport of the legislative history of Sections 402(a) and 402(b) is clear. The supporters of Title IV in both Houses of Congress, and especially in the Senate where this portion of the Act was written, recognized that the public interest in union democracy, as they viewed it, would be secured most satisfactorily by insuring that union members who were dissatisfied with some aspect of their organization's election procedures, and who were unable to obtain internal relief, would receive Government assistance in presenting their case in court. As a corollary, the legislators believed that in the absence of any expression of membership dissatisfaction to the union itself, the union members should be free, without Government direction, to set their own rules and regulations and to decide which officers they wished to retain and which officers they wished to unseat by protesting their elections. Congress expressed this conception of the public interest by passing legislation that set up a system which balances union autonomy and Government regulation. This end was achieved by a legislative guarantee that unions would be responsive to their membership. This guarantee was redeemed by authorizing the Government to use its coercive powers for the limited

purpose of helping union members achieve the type of organization that they desire, rather than by authorizing the Government to force its views of how the organization should be governed on the membership without regard to their desires.

We do not argue that in determining whether a particular matter may be raised by the Government the union member's internal complaint should be treated as if it is a formal pleading by a trained lawyer. The touchstone should be the complaining member's intent as revealed by a liberal and sympathetic reading of the complaint. The ultimate inquiry is whether the issue the Government seeks to present is an issue that the union had a fair opportunity to consider and resolve in connection with its consideration of the member's internal appeal.

In short, we suggest that in Title IV Congress placed its trust in the union as the initial tribunal for deciding internal appeals. Thus, the function of the exhaustion of remedies requirement is to insure that adequate respect is given to the Congressional allocation of power by requiring members not to bypass the initial deciding body Congress has chosen to hear their complaints.

The Government argues that its position must be accepted because it is enforcing the public interest in union democracy, not the private interests of complaining union members. There is one glaring difficulty with this argument. It is that the inclusion of Sections 402(a) and 402(b) in the Act, and the underlying legislative history, show that Congress believed that the public interest here was to insure that labor organizations would be what union members wanted them to be, and that a concomitant part of this conception of the public interest was that union autonomy and membership sovereignty should not be undermined by

a governmental bureaucracy which enforces its views rather than the members' views.

The Government also claims that the Congressional grant of broad investigatory powers in the Act must have been intended to allow it to seek to overturn an election on any ground found during an investigation, whether or not that ground had been raised by a member with the union through an internal complaint. However, the Government's broad investigatory powers come from the grant contained in Section 601 of the Act and not from Section 402(b). And there is no requirement of exhaustion of remedies as a precondition to investigations by the Government under Section 601 but there is such a precondition to suits under Title IV. This shows that Congress did intend to allow the Government to investigate matters which it could not bring to court.

III

Section 402(c)(2) of the Act requires the Government to prove that the alleged violation of Section 401 "may have affected the outcome" of the challenged election in order to be entitled to judicial relief. In the event that this Court decides that No. 57 is not moot the Government suggests that the Court should also decide whether the District Court's ruling that the Government had failed to sustain the burden imposed by Section 402(c)(2) was correct. The District Court's decision in this regard is correct.

Section 402(c)(2) is a product of the overall Congressional desire to minimize Government interference with internal union affairs by limiting rerun elections to those cases in which there is a reasonable probability that the alleged violation had a practical effect on the challenged election. This being true, at the very minimum, the Government is required to prove, as the prime element of its case, that a willing candidate was actually disqualified by the

unlawful rule in question. There is no sense in overturning an election on the basis of an allegedly unlawful rule if that rule did not operate to disqualify a single person, who had shown a desire to run for office, from the ballot.

In No. 57, the Government did not meet this minimal standard. The District Court found that the Glass Bottle Blower's 75% meeting attendance requirement in combination with Local 153's rule which severely limiting excused absences violated Section 401(e) of the Act. Given this basic finding, it was incumbent upon the Government, in order to satisfy the requirements of Section 402(c)(2), to prove that a prospective candidate was disqualified from the ballot despite the fact that he had attended 75% of the meetings other than those for which he had a valid excuse. However, the Government only presented evidence concerning one potential candidate, and that candidate had not attended 75% of the meetings other than those for which he had a valid excuse.

The Government suggests that union rules governing eligibility to be a candidate should be judged *in vacuo* and that the question of whether they had a practical effect on the conduct of the challenged election should be ignored. This argument is unsound for it reads the limitations of Section 402(c)(2) out of the Act in all such cases.

ARGUMENT

I

A REGULARLY SCHEDULED UNION ELECTION MOOTS A SUIT BY THE GOVERNMENT SEEKING TO OVERTURN AND RERUN A PRIOR ELECTION

In *Wirtz* v. *Locals 410, etc. Operating Engineers*, 366

F.2d 438, 442 (2nd Cir., 1966) the Court of Appeals stated:

> "The exclusive remedy which Congress has created for challenging a union election, see 29 U.S.C. §483, is a suit by the Secretary to declare the election void and to direct the conduct of a new election. This suit may only be brought after a union member has made a proper complaint to the Secretary and after the Secretary has made a finding of probable cause to believe that a violation of §481 has occurred. Congress intentionally created a narrow remedy under Title IV of LMRDA so that interference with union elections and management would be kept at a minimum. See Calhoon v. Harvey, 379 U.S. 134, 140 (1964).
>
> "In these two cases, the Secretary has no standing to attack the 1965 elections since no member of Local 30 or of Local 410 has filed a valid complaint challenging them. See Wirtz v Local Union No. 125, etc. 231 F. Supp. 590 (N.D. Ohio 1964). It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election, cf. Calhoon v Harvey, supra, we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot."

The Third Circuit in No. 57 (57 R.65) and the Sixth Circuit in No. 58 (58 R.112), the two other Courts of Appeals which have passed on the mootness question, have followed the reasoning of the Second Circuit and have reached the same result. The briefs of the respondents in Nos. 57 and 58 set out in detail the legal arguments which support the conclusion that a second regularly scheduled election moots a suit by the Government challenging the legality of the prior election. The essence of these arguments is that the Congressional conception of the public

interest in union democracy included, as a basic component, the recognition that Government intervention in internal union affairs should be kept to a minimum, *see* pp 13-18 *supra*. Title IV of the Act, therefore accords the Government a narrow, albeit potent, remedial authority. Thus, in a Title IV suit, which can only be brought at the behest of and in behalf of complaining union members, the Government must *prove* that the union election sought to be set aside was held under conditions which frustrated the expression of the membership's desires in order to provide the predicate for a district court order setting aside that election and mandating a rerun election to allow the members to choose officers to fill out the displaced officers' terms of office. We submit that these arguments are entirely sound and we incorporate them by reference here. At this point, we will therefore limit ourselves to a few brief observations on the arguments made by the Government.

The Government argues (Gov. Brief 24-25) that Title IV did not create a "narrow remedy", *Locals 410 etc., Operating Engineers, supra,* 366 F.2d at 442, but instead vested it with broad regulatory powers comparable to those granted to the National Labor Relations Board in supervising the conduct of representation elections, *see National Labor Relations Board* v. *A. J. Tower Co.,* 329 U. S. 329 (1946). In effect, the Government's basic position, as we understand it, is that the holding of an election which does not meet the standards of Title IV raises an irrebuttable presumption that future elections run by incumbent officers will not be run fairly, a presumption which overcomes the normal presumption of legality that would attach to them, *see* Section 402(a) of the Act; and that a "laboratory" election run by the Government, a concept developed by the NLRB, *see General Shoe Corp.,* 77 NLRB 124, 127 (1948), is permissible and necessary in order to remove the "taint" of the first election even though the second election

is not "demonstrably unlawful" and could not be challenged separately.

This argument suffers from a fatal flaw. The fact of the matter is that Congress specifically declined to clothe the Government with broad regulatory powers over union elections similar to those it had granted to the NLRB. Senate Report No. 1684, 85th Cong. 2nd Sess., pp. 12-15; United States Department of Labor, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 701 (G.P.O. 1964)[1] makes this perfectly clear:

> "The committee gave careful study to various proposals providing for the conduct of union elections by the National Labor Relations Board upon the request of a small percentage of the members. The committee rejected this approach . . ."

This language undermines the Governmert's general contention (Gov. Brief 21-25) that Congress feared that incumbents would perpetuate themselves in office by subtly manipulating the conduct of elections in a manner which is not "demonstrably unlawful". If Title IV had been a response to an over-riding suspicion of incumbents, Congress would have accepted the proposals requiring Government-run elections rather than rejecting them. For every union election normally involves incumberts seeking their own reelection or the election of their friends and allies. Moreover, as the Government candidly admits (Gov. Brief 34-36), in contrast to the broad cease and desist powers delegated to the NLRB in Section 10 of the National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, Congress specifically refused to enact proposals which would have allowed the Department of Labor to obtain injunctive relief which looks to the control and regulation of future elections, *see also Wirtz* v. *Hotel,*

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[1] Hereinafter referred to as Leg. Hist.

Motel and Club Employees Union, Local 6, ... F.2d ..., 65 LRRM 3032, 3036 (2nd Cir., July 28, 1967).

We submit that the conclusion to be drawn from what was accepted and what was rejected during the legislative process is that Congress recognized that a Government-run election of union officers was strong medicine; medicine which would be counterproductive in the overall pursuit of union democracy if too liberally applied. Congress, therefore, limited this remedy to the situation where a rerun was necessary in order to replace officers whose terms of office were demonstrably the result of an election which did not reflect the memberships' desires. Congress did not accord the Government a broad roving commission to run "perfect" elections where such a course of action would require the premature termination of the terms of office of validly elected union officers. To put this another way, Congress recognized that rerun elections have costs as well as benefits, and it determined that on balance the benefits outweigh the costs where the Government can prove that the election which is set aside was not a fair expression of the memberships' desires. Where such proof is offered the premature termination of the term of office of an incumbent is necessary to insure that the union will be run as the members wish it run. However, where the rerun election would terminate the tenure of validly elected officers in the name of a prophylactic policy based on a general suspicion of incumbent officers the considerations are quite different. And Congress determined that in the latter situation the costs outweigh the benefits.

In addition to being contrary to Congressional intent, the irrebuttable presumption the Government offers to justify its position suffers from another defect as well. For if the hypothesis upon which it proceeds is accepted, *arguendo*, it would only justify rerunning the elections of a small group of officers, those who controled the election

machinery in the second regularly scheduled election and whose personal conduct in the first election provides some base for the inference that they may resort to unlawful and unfair conduct to perpetuate themselves in office. Thus, reason dictates that the presumption cannot be applicable where an elected committee of rank and file members runs the second election. It cannot be applicable to incumbent officers who have no voice in running elections. It cannot be applicable to officers elected in the first election who were not incumbents. It cannot be applicable where the infirmity in the first election is that the incumbents applied, in a fair and even handed manner, a rule in an international's constitution later held to be invalid. Finally, it cannot apply if the second election results in the election of new officers. The Government, however, does not even advert to existence of any of these common situations and argues that the irrebuttable presumption it proposes justifies allowing it the power to seek a rerun election in every case in which a second regularly scheduled election occurs while a Title IV suit is pending. However, as we have just shown, it is plain that the underlying argument the Government offers is far too narrow in scope to justify the power it seeks.

The list of situations we have just noted also illuminates another point. It demonstrates that the Government seeks a broad and unstructured discretion, which cannot be limited by reference to the policies of the Act since it is not based on or justified by any provision in Title IV, to intervene in internal union affairs. This discretion would allow the Government the power to monitor the results of elections and to overturn them if the "wrong" man wins and to leave them standing if the "right" candidate, in its eyes, prevails. This is a far cry from the Congressional intent behind Title IV which is to insure that the members are free to have an organization responsive to their desires.

Finally, we wish to suggest that the administrative chaos which the Government suggests (Gov. Brief 27-34) will occur unless its position is accepted is overdrawn. As the Laborers show in detail in their brief in No. 58 of the cases instituted by the Government between June 30, 1960 and June 30, 1965 there have been only eight in which mootness has entered the picture. There are factors which indicate that the very small number of cases which have been affected by the mootness doctrine will probably be reduced further in the future. First, the mootness doctrine appears to have caught the Government unaware. Prior to the decision in *Locals 410, etc., Operating Engineers, supra.*, 366 F.2d at 442, the Government was willing to allow cases to remain dormant for one or two years for reasons of litigation strategy, *see Wirtz* v. *Locals 545, etc., Operating Engineers*, 366 F.2d 435, 438 (2nd Cir. 1966). It may be presumed that once the mootness doctrine is definitely established the Government will revamp this strategy or secure protective agreements to cover the problem it creates. Second, the Act is still in its infancy and the proper scope of the exhaustion of internal remedies requirement in Sections 402(a) and 402(b) of the Act, the meaning of the provision requiring the Government to prove that the alleged violation "may have affected the outcome of an election" in Section 402 (c)(2), and the proper scope of the permission which allows unions to set reasonable qualifications on the right to run for office in Section 401(e) are all unsettled. Once these basic points have been definitively resolved it is reasonable to expect that litigation under Title IV will be simplified, and that most suits arising under it will involve questions concerning the application of general principles to particular factual situations; questions which will normally be settled in the district courts without the need for appeals. Indeed, we believe that it is fair to say that the Government's insistence on complicating lawsuits by raising issues not raised by complaining union members,

see Section II, *infra.*, indicates that many of its problems are of its own making. Finally, as the Laborers indicate in their discussion of *Ray* v. *Blair*, 343 U.S. 214 (1952) the Government is insufficiently cognizant of the speed with which the courts can act on election matters. And expedition is possible in this area without imposing a heavy burden on the courts because of the small number of cases necessary to police the Act, a number which reflects the strenuous efforts at voluntary compliance which have been made by the labor movement.

II

IN A TITLE IV LAWSUIT THE GOVERNMENT DOES NOT HAVE THE POWER TO RAISE AND THE DISTRICT COURTS DO NOT HAVE THE JURISDICTION TO CONSIDER MATTERS NOT RAISED BY UNION MEMBERS IN THEIR INTERNAL UNION COMPLAINTS

In the event that this Court decides that No. 58 is not moot, the Government (Gov. Brief 38-49) suggests that the Court should also decide whether the District Court was correct (58 R. 5-14) in refusing to allow the Government to expand the case beyond the limits set by the complaining union member in his internal protest to his union. The validity of this ruling turns on the proper interpretation of Sections 402(a) and 402(b) of the Act, which provide:

> "Sec. 402. (a) A member of a labor organization—
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
>
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months

after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization."

The Act has now been on the statute books for over six years. During that time, two diametrically opposed positions on the proper interpretation of these Sections have emerged. The first is that Sections 402(a) and 402(b) of the Act are to be read together as a single interconnected entity which limits the matters the Government has the power to raise, and the district courts have the jurisdiction to consider, in Title IV suits, to the issues which were first raised by union members with their unions.

The second position, which has been consistently espoused by the Government (Gov. Brief 44-49), is that Sections 402(a) and 402(b) should be viewed as entirely separate and distinct. The Government's position is that if it

receives a complaint from a union member who has filed an internal complaint as to any matter, it has *carte blanche* to introduce any issue it may choose into Title IV court litigation, without regard to whether or not that issue was raised by the complaint filed in the internal procedures the union provides for hearing appeals as to the conduct of elections.

We submit that the first of these two reading of the Act is the proper one, since it conforms to the accepted canons of legislative interpretation by according full and harmonious effect to both Sections, and since it, and it alone, carries out the Congressional intent as revealed by the legislative history. So far as we have been able to ascertain from our research the essence of our position in this regard has been accepted in every case in the lower courts in which a written opinion discussing this point has been issued, *see* pp. [redacted] *infra*.

31-37

The Sixth Circuit did not reach this question and thus the normal procedure would be for this Court to reject the Government's suggestion and to simply remand the case to the court below for a decision on the merits. However, the Government has fully briefed the question, and it has been considered extensively by the lower courts. We therefore turn to an exploration of it.

1. Sections 402(a) and 402(b) of the Act are the direct outgrowth of Sections 302(a) and 302(b) of S. 3974 (85th Cong., 2nd Sess.) as it was reported by the Senate Labor Committee and as it passed the Senate on June 17, 1958; and of Sections 302(a) and 302(b) of S. 1555 (86th Cong., 1st Sess.) as it was reported by that Committee and as it passed the Senate on April 25, 1959. These bills in turn stemmed from Sections 4(a) and 4(b) of S. 3751 (85th Cong. 2nd. Sess.). as it was introduced by Senator Kennedy on May 5, 1958. The original Landrum-Griffin Bill, H. R. 8342 (86th Cong., 1st Sess.) as it passed the House,

as well as the earlier version of H. R. 8342 which was reported out of Committee, contained a different procedure for judicial enforcement, one providing for direct court actions by union members rather than suits by the Government.[2] The Conference Committee adopted in its entirety and without change, the language of Sections 302(a) and 302(b) of S. 1555 and the Conference Committee's version of the legislation in this regard was enacted into law.

After S. 3974 was reported out of Committee in 1958, there were no changes of substance, so far as the issue presented here is concerned, in the language of what was

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[2] H. R. 8342 as it passed the House provided:

"Sec. 402(a) A member of a labor organization—

(1) who is aggrieved by any violation of section 401, and

(2) who (A) has exhausted the reasonable remedies available under the constitution and bylaws of such organizations and of any national or international labor organization with which such organization is affiliated, or (B) has diligently pursued such available remedies without receiving a final decision within six calendar months after their being invoked, may bring a civil action against such labor organization in any district court of the United States for the district having jurisdiction of such labor organization to prevent and restrain such violation and for such other relief as may be appropriate, including the holding of a new election under the supervision of the Secretary and in accordance with the provisions of this title. Where an election has already been held at the time such action is brought, such election shall be presumed valid pending a final decision thereof, as hereinafter provided, and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(b) For the purposes of this section, district courts of the United States shall be deemed to have jurisdiction of a labor organization in the district in which such labor organization maintains its principal office. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff, or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." Leg. Hist. 828

to become Sections 402(a) and 402(b) of the Act.[3] The enforcement provisions of Title IV did undergo some change during Congress's deliberations, however, the basic structure of the exhaustion of internal remedies requirement was set from the inception of the process that led to the final Act. Thus it is clear that the primary sources for the proper approach to the interrelationship between these Sections are the relevant statements of Senator Kennedy, the original sponsor of the measure, and th majority reports of the Senate Labor Committee on S. 3974 and S. 1555. In his remarks on the floor explaining S. 3751, Senator Kennedy stated:

> "At the present time, if a union member feels that his rights have been jeopardized in an election, he is able to appeal to a State court. I have done some research into that matter, and I believe we have found that only one local union election in recent years has been set aside as a result of an attempt by a member to obtain his rights by appealing to a State court. The classic example of the difficulties involved is that of the 13 members of the teamsters union, who, after weeks and months of litigation, have had to accept a settlement which is highly unsatisfactory in regard to the holding of an election; but the lawyer for the rank-and-

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[3] For the Court's convenience in tracing the evolution of Sections 402(a) and 402(b) of the Act, we have printed the pertinent provisions of S. 3751, S. 3974, S. 1555 and of the Act *seriatum* as an Appendix to this brief. This evolution shows that the following are the only changes made after S. 3974 was reported out of committee. First, S. 3974 required the complaining member to have exhausted internal remedies for four months rather than three, and required the Secretary to bring suit within 30 days rather than 60. Second, the phrase "pertaining to the election and removal of officers" in the first parenthesis in the text of Section 402(a) was not included in Section 302(a) of S. 3974. Third, the provisions relating to a procedure for removing officers, and for court preservation of assets, both of which are found in Section 302(b) of S. 1555 as it passed the Senate and in Section 402(b) of the Act, were not included in Section 302(b) of S. 3974. Fourth, only Section 302(b) of S. 1555 contained a provision relating to service of process.

file members has submitted a bill for $300,000. So that is, I believe, the classic example of the fact that the right of the members to appeal to a State court is useless.

"In the bill we provide the right to appeal to the Secretary of Labor, whenever a member believes that his rights, as provided in the bill in the case of an election, have been denied to him. Then the Secretary of Labor in effect becomes the union member's lawyer. Such a provision is infinitely stronger than any provision now in effect." Cong. Record 10947-10948, Senate, June 12, 1958, Leg. Hist. 1093.

Moreover, the majority reports of the Senate Labor Committee also contain a very explicit explanation of the purpose of the exhaustion of internal remedies requirement contained in Sections 402(a) and 402(b). Thus, Senate Report No. 1684, pp. 12-15, Leg. Hist. 701 states:

"The foregoing provisions are to be enforced by the Secretary of Labor, upon complaint of any union member, through court action similar to the proceedings to lift improper trusteeships. In filing a complaint the member must show that he has pursued any remedies available to him within the union and any parent body in a timely manner. This rule preserves a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections. If the member is denied relief by the union or can obtain no decision from the union one way or the other within 4 months, he may complain to the Secretary."

* * * * * * *

"The committee gave careful study to various proposals providing for the conduct of union elections by the National Labor Relations Board upon the request of a small percentage of the members. The committee rejected this approach for two reasons.

"One fundamental objection is that these proposals turn over to an arm of the State the responsibility for carrying on the internal governmental processes of voluntary associations without any showing that the union officers and members are incompetent or corrupt. Such a measure does not promote freedom or democracy. It reduces self-government. It denies the private responsibility and self-determination which lie at the heart of a voluntary association."[4]

The foregoing portion of the Senate Report is a reflection of the overall philosophy which guided the framers of Sections 402(a) and 402(b) and which they stated as follows in Senate Report 187, 86th Cong. 1st Sess., pp. 5-7, Leg. Hist. 118:

"1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents.

"2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. The committee strongly opposes any attempt to prescribe detaineld procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing and destroy union independence.

"3. Remedies for the abuses should be direct. Where the law prescribes standards, sanctions for their violation should also be direct. The committee rejects the

[4] The first portion of this statement appears again in Senate Report No. 187, pp. 19-22, Leg. Hist. 778.

notion of applying destructive sanctions to a union, i.e., to a group of working men and women, for an offense for which the officers are responsible and over which the members have, at best, only indirect control. Still more important the legislation should provide an administrative or judicial remedy appropriate for each specific problem."[5]

Two final points should be noted in order to complete the legislative picture. First, while the approach taken in the original Landrum-Griffin Bill, as it passed the House, was different from that taken in the Senate, that bill also required an exhaustion of internal remedies. Thus as to this matter the dominant factions in both Houses of Congress were on one mind, *see* n. 2, p. 18, *supra*, and Cong. Record 15707-15708, House, August 12, 1959, Leg. Hist. 823. Second, the inclusion and retention of the exhaustion of internal remedies requirement was a conscious choice made with full recognition of the consequences it entailed. For a minority of Senators, led by Senator Goldwater, argued vigorously that the provision would hinder the effective enforcement of the statute, *see, e.g.*, Cong. Record 16489, Senate, August 20, 1959, Sen. Goldwater, Leg. Hist. 830; Senate Report No. 187, pp 103-104, Minority Views, Leg. Hist. 783.

2. The purport of this legislative history is clear. The supporters of Title IV in both Houses, and especially in the Senate where this portion of the Act was written,

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[5] With the exception of the above-noted statements, the framers of Sections 402(a) and 402(b) limited themselves to analyses of the bill which track its language and are thus of litfle help in the resolution of the issue presented here. This is also true of the remarks made by the House supporters of the Senate approach. See e.g., Cong. Record 7953-4, Senate, May 5, 1958, Sen. Kennedy, Leg. Hist. 699; Senate Report No. 187, pp. 46-50, Leg. Hist. 780; Cong. Record 7024-5, Senate, April 29, 1959, Sen. Kennedy, Leg. Hist. 808; Daily Cong. Record A-6573, Appendix July 29, 1959, Rep. Brademas, Leg. Hist. 815; House Conference Report 1147, 86th Cong. 2nd. Sess., pp. 33-35, Leg. Hist. 835.

recognized that the public interest in union democracy, as they viewed it, would be secured most satisfactorily by insuring that union members who were dissatisfied with some aspect of their organization's election procedures, and who were unable to obtain internal relief, would receive government assistance in pressing their case in court. As a corollary, the legislators believed that in the absence of any expression of membership dissatisfaction to the union itself, the union's members should be free, without government direction, to set their own rules and regulations, and to decide which officers they wish to retain and which officers they wish to unseat by protesting their elections. The Congressional conception of the public interest rests on three considerations. First, that there is every reason to trust in the probity, judgment and democratic instincts of union members. Second, that the vitality of union democracy would be dissipated if the autonomy of the organization was not respected, and if its internal procedures were bypassed and permitted to atrophy. Third, that union democracy would be subverted if the Government was given discretion to intermeddle in internal union matters as to which no member had a complaint. In short Congress recognized that a limitation on the coercive powers of the Government was an integral component of its overall conception of the public interest in union democracy.

Congress expressed this conception of the public interest by passing legislation that set up a system which balances union autonomy and government regulation. This end was achieved by a legislative guarantee that unions would be responsive to their membership. This guarantee was redeemed by authorizing the Government to use its coercive powers for the limited purpose of helping union members achieve the type of organization they desire, rather than by authorizing the Government to force its views of how the organization should be governed on the membership without regard to their desires. *See, in general,*

Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609 (1959); Mitchell, *Safeguards for Union Democracy* in Slovenko, Ed., Symposium on the Labor-Management Reporting and Disclosure Act of 1959, 135 (1961).

The foregoing, we submit, is the only rational explanation for the inclusion of Section 402(a) in the Act. The requirement that only complaints by union members may be used as a basis for a court suit, and the further limitation that only complaints which have been tendered to the union are a proper predicate for coercive action by the Government, make sense only if it is recognized that the enforcement mechanism of Title IV is the product of the desire: first, to promote the responsibility of the union to its members and equally of the members to their organization; and second, to protect union self-government and membership sovereignty from the overweening weight of an external government bureaucracy. Plainly, the entire remedial scheme is reduced to a logical and practical absurdity if the Government is held to have the power to bring a suit based on matters not raised by union members in their internal complaint. Suppose, for example, that a union has an eligibility rule which the membership wishes to retain and which the Government believes is unsound and should be changed. The union holds an election in 1963 as to which no internal complaint is filed but as to which a direct appeal to the Secretary is made alleging that opposition candidates were threatened with reprisals. No court action is taken because there was no exhaustion of remedies. In 1966, the union holds its next regularly scheduled election and it receives one complaint alleging that the ballot box was stuffed. It investigates and rejects the appeal as unwarranted. The complainant goes to the Government, it investigates and concludes that the complaint is without substance and then files a suit challenging the eligibility requirement. Allowing the Government to

bring suit in the second instance, even though it is plainly barred in the first, would reduce the exhaustion of remedies requirement to a lifeless formality devoid of any actuating principle which explains and justifies its inclusion in the Act. On the other hand, as we have just attempted to show, if the Government is barred from proceeding in both instances, as Congress intended, the compelling logic of the exhaustion of remedies' requirement is preserved.

The cases in which the Government has attempted to litigate issues not raised by the union member may be broken down into two categories. The first category of cases includes those in which allegations are raised by the Government concerning conduct which is said to violate the applicable union constitution or the provisions of the Act, *see Hotel, Motel and Club Employees Union, Local 6, supra.*, 65 LRRM at 3035, or in which the Government challenges provisions of the union's constitution and bylaws as unlawful, *see Locals 545, etc., Operating Engineers* v. *Wirtz*, . . F.2d . ., 65 LRRM 3041 (2nd Cir., July 28, 1967). The second category of cases are those in which the Government seeks to widen an internal complaint specifically directed to an election for a particular office to include elections for other offices run at the same time, see *Wirtz* v. *Locals 9, etc., Operating Engineers*, 366 F.2d 911 (10th Cir., 1966) vacated at moot 387 U.S. 96 (1967), as well as No. 58. The general observations on the function of the exhaustion of internal remedies requirement we have set out thus far are applicable to both of these categories of cases.

First, there can be no doubt that the "conduct" cases are precisely governed by the exact words of Senate Report 1684, p. 12, Leg. Hist. 701 that "[the] rule [requiring exhaustion of remedies] preserves a maximum amount of independence and self government by giving every international union the opportunity to correct improper local elections." A suit based on conduct, which violates a union

constitution, or the safeguards established by the Act, and which was not raised by a union member in an internal complaint plainly runs counter to this [redacted] statement of Congressional intent. The cases challenging provisions of a union's constitution have focused on Section 401(e) which permits unions to set reasonable qualifications on the right to run for office. The very purpose of allowing unions to set reasonable qualifications is to enable each organization to set up a system of self-government responsive to its needs, *see Hotel, Motel and Club Employees Union, Local 6, supra.*, 65 LRRM at 3033-3035. Such a challenge, which does not lend itself to any simple or precise answer, may, therefore, bring into question the most deep-seated assumptions upon which the organization is built, and it may call for a sensitive balancing of considerations of a political nature. Moreover, as No. 58 indicates, most internal appeals do not raise straightforward questions of statutory law. They often raise questions which require an interpretation of the union's constitution, and are usually grounded in particular facts, and in the practices, usages, and traditions of the group. As to these matters the union is the logical agency to which to look for expertise. Thus, as in the conduct cases, the officers of the union must, before the Government's coercive powers are invoked, be allowed the first opportunity to assess the validity of the rule in light of the objections of those members who consider themselves aggrieved by it. Prior consideration of the rule may obviate the need for litigation, or, if litigation proves necessary, may prove illuminating to the courts. In addition, given the nature of the judgment that must be made when a rule is challenged as unreasonable, surely there is no other area of the Act as to which it is as necessary to ascertain the membership's desires. The members know the organization best and if they have all reached the conclusion that they wish to abide by a certain set of rules, the Congressional policy, which is to insure

that the organization is responsive to their desires, is being fulfilled.

The considerations just noted are also relevant in those cases in which the Government attempts to go beyond a complaint, which is limited in terms to a challenge of an election for a specific office, to challenge elections for other offices run at the same time. A complaining member may disapprove of a rule, or conduct, common to the running of all the elections. However, he may also believe that the increased organizational stability which will result if he does not challenge some of the elections is preferable to a rerun of all of them. In other words, he may believe that his aims are accomplished if the union is shown that it has erred, in some respect, in running an election, and that it is not necessary to rerun a number of elections for various offices to accomplish that aim. Or, he may believe that the organization will benefit if the rule in question is overturned in a proceeding in which the costs inherent in a rerun, which may be considerable, are kept to a minimum. Or, he may believe that some of the elected officers are so competent and popular that a rerun of their elections would be a waste of time.

In addition it is reasonable to expect that when a limited complaint is filed the officers whose elections are not put in question normally do not take a part in the internal proceedings of the union. If the Government can expand the members complaint it would mean that the tenure of these officers could be terminated even though they did not have occasion to present their position to the union. In sum whatever the complainent's motives may be, he and his fellow union members know their organization best, and if they have all reached the conclusion that they wish the result of the election for a certain office to stand, the Congressional policy, which is to insure that the organization is responsive to their desires, is being fulfilled. For these reasons, we submit that Congress specifically withheld from

the Government the authority to substitute its judgment for theirs. Indeed when the Government attempts to broaden a complaint focused on an election for a particular office to other elections run at the same time it seizes on a fortuitous circumstance in order to expand its authority. For the union could properly stagger its elections, President one year, Secretary-Treasurer the next, etc. Expansion of a complaint to cover additional offices would plainly make no sense if this course was followed. Moreover Local and International elections may be run at the same time, and it just as plainly makes no sense to say that a challenge to a single Local's election opens the International's to challenge or vice-versa.

At this juncture in our argument we wish to make one point quite clear. We do not contend that in determining whether a particular matter may be raised by the Government the union member's internal complaint should be treated as if it is a formal pleading by a trained lawyer. The touchstone is the complaining member's intent as revealed by a liberal and sympathetic reading of his internal appeal. The ultimate inquiry is whether the issue the Government seeks to present is an issue the union had a fair opportunity to consider and resolve in connection with its consideration of the appeal. Under this standard if the member complains that the ballot box was stuffed, a suit alleging that a provision of the union's constitution governing eligibility of candidates is not a reasonable qualification on the right to run for office should be held to be improper. It plainly does not stem from the member's complaint. Naturally, there will be hard cases in between the extremes—cases which will require some line drawing. But this is normally true in the law, and the dimensions of the problem here seem modest. For unions can and do take steps to see that the complaining member is encouraged to spell out in some detail the areas of his concern in order

to insure that their quasi-judicial procedure for hearing appeals operates in a fair and comprehensive manner. The record thus created will often point the way that a district court should go when this type of factual issue is presented.

In the leading case of *United States* v. *L. A. Tucker Truck Lines,* 344 U. S. 33, 36-37 (1952), Mr. Justice Jackson stated:

> "We have recognized in more than a few decisions and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. It is urged in this case that the Commission had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the Commission is obliged to deal with a large number of like cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence. Simple fairness to those who are engaged in the tasks of administation, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." (footnotes omitted)

We suggest that in Title IV Congress placed its trust in the union as the initial tribunal for deciding election appeals, since it can offer speedy relief after hearing from all the interested parties, and since the questions which will normally be raised in election contests are those as to which it has expertise, *cf. United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). Thus, the function of the exhaustion of remedies requirement is analagous to the function of the doctrine stated in *Tucker*. It insures

that adequate respect is given to the Congressional allocation of power by requiring union members not to bypass the initial deciding body Congress has chosen to hear their complaints.

The Laborers demonstrate at length in their brief in No. 58 the painstaking approach they have taken to insure that Congress's trust is respected, an approach which requires a substantial investment of time by the Union's top officers. The conscientious attitude of the Laborers is fully representative of the attitudes of AFL-CIO affiliates. Thus, despite the fact that AFL-CIO unions ran no less than 50,000 elections between 1960 and 1965 the Government instituted only 36 successful cases against them during that time, *see* Appendix B to Respondents brief in No. 58. The significance of this figure is apparent once it is realized that

The Laborers, [redacted] in five years (1961-1966), [redacted] handled 359 election appeals and that 19 were withdrawn, 95 upheld and 245 denied. Of the 245 denied 3 resulted in successful litigation by the Government. We have asked our two largest affiliates, the United Steelworkers of America and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America to detail their experience in handling election appeals in order to supplement the material presented by the Laborers. The UAW's material covers 1963-1966. It shows that the Union received 76 appeals, that it upheld 14, dismissed [illegible] and denied 61. In 1 case in which an appeal was d[illegible] and in 1 upholding an appeal the Executive Board re[illegible] reversed by the Public Review Board instituted by the U.A.W. Of the 61 denials, 1 resulted in successful litigation by the Government. The Steelworkers decided 94 election appeals from 1964 through 1967. In 51 remedial action was ordered. None of the cases in which the appeal was denied resulted in successful litigation by the Government.

3. The essence of the position we urge has been adopted in every case we have found in which the issue presented here has been passed on in a reasoned opinion—including the opinions of both the Courts of Appeals which have addressed themselves to it.

In *Locals 9, etc., Operating Engineers, supra.*, 366 F.2d at 913-914, a case where the complaining member challenged an election for a specific office and the Government tried to broaden its lawsuit to include elections for other offices run at the same time, the Court stated:

> "An examination of the legislative history of the Labor Management Reporting and Disclosure Act discloses that it was one of the most controversial efforts before the Congress in a decade. Two years of extensive public hearings had pointed up the need for legislation that would (a) sustain the internal stability of union organizations, (b) guarantee the individual members a voice in the democratic control of the organization and (c) protect the rights of the individual members.
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> "The debates in the Senate at the time of enactment clearly indicates that all parts of the Act must be read in conjuncion with the other parts. 105 Cong. Rec. 6720 (1959) (remarks of Senator Kennedy).
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> "Thus, the Act itself clearly indicates a limitation on the part of the Secretary and the court to consider only matters in which a member has exhausted his internal remedies. This is in line with the legislative purpose to sustain the stability of the union organization by giving it the first opportunity to correct a grievance of an individual member."

In *Hotel, Motel and Club Employees Union, Local 6, supra.*, 65 LRRM at 3035-3036, the Second Circuit refused to allow the Government to expand its lawsuit to include allegedly unlawful conduct not complained of by any union member. It stated:

"It appears from the language of the statute itself that the Secretary may proceed to vindicate only those violations with respect to which he has received complaints. The legislative history reveals that Congress intended that the Secretary should have the power to bring an action only after a complaining member has exhausted his union remedies."

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"The Secretary argues strongly for a general power to protect the public interest, but nothing in the statute or in its legislative background suggest the existence of any such general power. The Secretary's function is, in Senator Kennedy's words, to act, as 'the [complaining] union member's lawyer."

See also Local 545, etc. Operating Engineers, supra., 65 LRRM 3041 where the same court refused to allow the Government to expand its lawsuit to include an allegedly unlawful constitutional rule not complained of by any union member.

The leading district court decision was rendered in No. 58 where the court stated (58R. 9, 13):

"Investigation of the deliberations of congress... illuminates the viability of the exhaustion doctrine. At no point did the legislators indicate a willingness to abrogate this traditional requirement in favor of summary action by the federal government; on the contrary, we are confronted at every turn with positive, unequivocal expressions of faith in the ability of unions to regulate their own affairs.

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"Plaintiff here invokes the doctrine of 'public interest' [to advance his position]. Can we place this 'public interest' of which the government is here so solicitous above the interest of the individual members of the union? Unions are voluntary associations, organized by workers to promote their common welfare. The sole reason for this existence is to advance the cause of the individual laborer by negotiating from a position of collective strength to secure favorable wages and work-

> ing conditions. The individual members intrust this strength to the officers of the union, just as the members of this defendant union did by the election of June 8, 1963. It is highly significant that not one voice of protest has been heard from the membership against the conduct of that election. We do not think that the Secretary under the guise of 'public interest' may be permitted to complain when the membership has not; to hold otherwise would in fact, be inimical to true public interest because it would require legislation by judicial fiat. If the members are satisfied, then the government ought to be satisfied."

See also *Wirtz* v. *Locals 406 etc., Operating Engineers,* 254 F. Supp. 962 (U.S. D.C. E.D. La., 1966); *Wirtz* v. *Local 174, Musicians,* 65 LRRM 2972 (U.S. D.C. E.D. La., 1967).

A somewhat different version of this position was taken by the court in *Wirtz* v. *Local 169, Hod Carriers,* 246 F. Supp 741, 751-752 (U.S. D.C. D. Nev., 1965) where the court held:

> "We think the express statutory requirement of exhaustion of internal union remedies must be given effect. We do not, however, believe that it is the intention of the Act to restrict the Secretary's action to the precise complaints asserted by the union member who filed the letter-complaint with the Secretary. The act should receive a practical interpretation governed by common sense and realities. If Congress intended that the union member assert a lawyer-like protest to the Executive Board, covering all the bases by specific averment, and buttressed by evidence of all irregularities in the election, there would be no occasion for an evidentiary investigation by the Secretary.
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> "The act should be construed to mean that the Secretary has, on complaint of a union member, the right to investigate all aspects of the contested election and to base a complaint to the Court on every issue which the defendant union had a fair opportunity to consider and resolve in connection with any member's appeal to the General Executive Board of the union. The Secretary should not be limited to the ground

asserted by the one member who complained to the Secretary."

See also Wirtz v. *Local 450, etc., Operating Engineers,* 63 LRRM 2105 (U.S. D.C. S.D., Tex., 1966); *Wirtz* v. *Hotel and Restaurant Employees Local 705,* 63 LRRM 2315 (U.S. D.C. E.D. Mich. S. D., 1966).

The opinion in *Local 169 Hod Carriers* adds two elements to those recognized in *Locals 9, etc., Operating Engineers, supra, Hotel, Motel and Club Employees Union, Local 6, supra* and No. 58. The first is that unions must view each complaint as presenting an overall issue, not just a private dispute between the particular complaining member and the union, and that it must deal with the complaint accordingly. If, for example, a member alleges that a rule was discriminatorily applied in certain instances the union must look into the overall application of that rule in the challenged election, *see Hotel and Restaurant Employees, Local 705, supra.* This interpretation of the Act may have some merit at least in the limited situation where the complaint raises a broad issue as to which the member fails to adduce adequate proof and the member then secures newly discovered evidence, from the government or otherwise, relevant to the basic issue he raised and resubmits that evidence to the union. Next the court stated, 246 F. Supp. at 752, that there are some basic procedural matters, at least those about which the member would have difficulty securing information, which the union must consider in every appeal whether they were raised or not. We flatly disagree with this proposition. The statutory requirement of exhaustion of remedies contains no exceptions for basic procedural matters—to fashion one is pure judicial legislation. Moreover, this latter point cannot and should not affect the Court's decision

here. For as the court in *Local 169, Hod Carriers, supra,* explicitly recognized the exhaustion of internal remedies requirement is normally applicable, particularly where a matter within the complainant's knowledge is involved. Here there can be no doubt that the complaining member knew that the voters whose eligibility he challenged voted in the general election. Moreover, while we do not believe that the basic rule we propose admits of exceptions, we think it is quite clear that if it does those exceptions should not be worked out in a *dictum* at this point. Rather they should evolve through a process of litigating elucidation as the lower courts apply the basic guidelines set by this Court.

In sum, the status of the law developed by the lower courts is this—every case in point, in which a written opinion has been filed, that we have found, or that the Government has cited, accepts the basic proposition that Section 402(a) and 402(b) are to be read together to limit the [redacted] to issues "the defendant union had a fair opportunity to consider and resolve in connection with any *member's* [*internal*] *appeal. . . .*" *Local 169, Hod Carriers supra,* 246 F.Supp. at 752 (emphasis supplied). It being understood that for some courts issues mean not simply an individual grievance (Was the complainant discriminated against in the application of a union rule?) but the underlying question raised (Was there discrimination in this election in the application of the rule?) On the other hand, there is no case, in which a reasoned opinion has been rendered, which stands for the proposition, advanced by Government, that a member's complaint merely triggers the Government's authority to initiate court action and that the Government then has *carte blanche* to introduce any issue it may choose into the litigation without regard to the scope of the member's internal complaint.

4. We shall now attempt to show that none of the Government's counter arguments disproves the validity of our

position. The Government first argues (Gov. Brief, pp. 17-19, 43-44) that its position must be accepted because it is enforcing the public interest in union democracy, not the private interests of complaining candidates for office. There is one glaring difficulty with this argument. It is that the inclusion of Sections 402(a) and 402(b) in the Act, and the legislative history we have outlined, show that Congress believed that the public interest here was to insure that labor organizations would be what union members wanted them to be, and that a concomitant part of this conception of the public interest was that union autonomy and membership sovereignty should not be undermined by a governmental bureaucracy which enforces its views rather than the membership's views. In short, the aim of Title IV is to provide machinery through which complaining union members may secure assistance in vindicating their position in the courts. There is thus no distinction between the public interest and the interests of complaining members. The Government's argument is in no wise strengthened by its showing, with which we agree, that Title IV protects the rights of all union members not just losing or disqualified candidates. For the issue here is whether the Government can utilize its coercive powers by raising an issue which *no* union member has shown an interest in raising, not whether the Government can raise an issue as to which a member, other than a candidate, has complained.

This conception of the public interest in union democracy, and its method of vindication, is perfectly consistent with this Court's recognition in *Calhoon* v *Harvey*, 379 U.S. 134, 140 (1964) that in Title IV "Congress decided to utilize the special knowledge and discretion of the Secretary in order to best serve the public interest". Under our view the Secretary is still charged with the responsibility of achieving voluntary compliance; of drawing together membership complaints about an election, if there are more than one, and welding them into a single coherent lawsuit; of

giving form and direction to the statute by issuing rules and regulations which serve to guide union officers and union members; of skillfully developing and arguing before the courts the matters raised by union members; and of investigating union members' unproved or half-proved allegations to see if they have substance and should be pressed to vindicate the public interest in union democracy or should be dismissed short of court, thereby saving the union from the expense of defending frivolous and vexatious litigation. Moreover, he does all this at the public's expense rather than at the expense of union members who might not be able to afford to do it for themselves. Plainly, the diligent and sensitive effectuation of all these tasks is a sufficient responsibility for any Government official.

The Government next argues (Gov. Brief 45) that the language of Section 402(b) ("The Secretary shall investigate such complaint and if he finds probable cause to believe that a violation of this Title has occurred . . . he shall . . . bring a civil action . . .") lends some support to its view that a lawsuit brought under that Section may be based on issues other than those raised by union members. If Section 402(b) began by stating, "The Secretary shall investigate *in its entirety* any election about which he has received a complaint . . .," we could see some logic in the Government's argument that the use of the words "if he finds . . . a violation of this Title has occurred . . . he shall . . . bring a civil action" advances its cause. But that is not the way the legislation reads. Instead, Section 402(b) opens by referring to the member's complaint and by limiting the ensuing investigation and resulting suit to the subject matter of that complaint. Once this point is taken into account, the actual import of Section 402(b), read in its entirety, supports our position rather than the Government's, for the reference to the member's complaint is an explicit recognition that Sections 402(a) and 402(b) are related to each other as a single interconnected entity. Since

the Government's powers are explicitly tied to the member's complaint at the start of Section 402(b), it is most logical to conclude that Congress realized that it was unnecessary, in order to manifest its will, to use the redundant "such violation" rather than "a violation."

We have pointed out, pp. 18-19 *supra.*, that the operative language of what was to become Sections 402(a) and 402(b) had hardened into final form as Sections 302(a) and 320(b) of S.3974 (85th Cong., 2nd. Sess.) Nevertheless the Government's argument from the legislative history relies on the language of Section (b) of S.1002 (86th Cong., 1st Sess.) a bill that was not even being considered at the relevant time, to show that the use of the phrase, "a violation" was a conscious rejection of the narrower phrase, "such violation." Moreover, it should be pointed out that S. 1002 was not in any sense an attempt to amend or perfect S. 3974. It was a complex bill which contained a procedure for regulating elections completely different from the one embodied in S. 3974, and in the Act, and it proceeded from far different premises than those shared by the drafters of the final legislation. Clearly, therefore, it is an unlikely source from which to expect enlightment on the intentions of those who actually conceived the Act. Equally unenlightening is the quotation from Senate Report No. 187 for it merely paraphrases rather than explains the language of the Act. In short the Government's linguistic argument is untenable.

The Government also claims (Gov. Brief 45-47) that the Congressional grant of broad investigatory powers in the Act must have been intended to allow it to sue to overturn an election on any ground found during an investigation whether or not that ground had been raised by a member with the union through an internal complaint. This claim springs from an erroneous assumption. There is nothing to indicate that the Government was given broad powers of in-

vestigation by Section 402(b) of the Act. The inference is in the other direction, for investigations under Title IV are tied to the complaint ("The Secretary shall investigate *such* complaint"). Moreover under Section 402(b) the Government is given sixty days to bring suit not sixty days to investigate the complaint. In light of the many tasks the Government must perform as the complainant's lawyer, *see* pp. 36-37 *supra.*, this period does not indicate a Congressional desire to have the government investigate the entire election before deciding whether to file suit. It is a call to swift action not to a broad investigation.

In actuality the Government's broad investigatory powers come from the grant contained in Section 601 of the Act, 29 U.S.C. 521, and the cases it cites (Gov. Brief 45-46) arose under that Section. Once this is recognized the entire scheme of the Act falls into place. For it is then clear that Congress placed a requirement of exhaustion of remedies in Title IV of the Act as a pre-condition to court action to set aside a union election, but that it did not place any such requirement as a pre-condition to investigations by the Government under Section 601, *see Wirtz* v. *Local 191, Teamsters,* 321 F.2d 445 (2nd Cir., 1964). To our mind, this shows that Congress did indeed intend to allow the Government to investigate matters which it could not bring to court. The Government in its zeal to expand its powers fails to realize that instances where it believes there is an uncorrected wrong, but can not secure court relief, are a natural product of the overall balance between union autonomy and government power that Congress struck in this area. For example, if a union member comes to the Government and tells [redacted] that there has been a union election with gross illegalities, and the Government's investigation leads it to the conclusion first, that the allegations are true and second, that there has been no internal protest to the union of any sort, it cannot go to court.

There are sound reasons for this distribution of power when the Government's educational and persuasive functions, as opposed to its coercive functions, are taken into account. For, if the Government's investigation shows that election violations exist which were not discovered by the membership, or to which the members have made no objection, it can inform them and the general public of its findings. The possibility of disclosure, as Congress recognized, has a strong prophylactic effect on union action. Moreover, if investigation indicates fraud or other wrongdoing, disclosure could lead to membership action to remove the officers responsible, *see* Section 401(h) or to criminal proceedings, *see* Section 607. In this regard, it should not be forgotten that the overall title of this act is "The Labor-Management Reporting and Disclosure Act of 1959" and that the title is the reflection of the Congressional belief that disclosure in and of itself is a powerful weapon. As the District of Columbia Circuit noted:

> "The public disclosure functions of Section 601 have a certain similarity of purpose with the disclosure concepts of the Securities and Exchange Act; to a degree each has as its purpose ventilation of facts in which the public at large, as well as a particular segment—here union members— have a genuine interest. A labor union is not a private enterprise. Congress seems to have thought that reporting and disclosure would serve a prophylactic function, deterring some of the corrupt practices and acts of untrustworthiness on the part of union officers which Congress had found prevalent, and would enable union members to govern their organizations more intelligently." *International Brotherhood of Teamsters* v *Wirtz*, 346 F.2d 827, 831 (D.C. Cir., 1965).

Indeed, the fact that the Government has fought to vindicate its broad powers under Section 601 demonstrates that when it is to its advantage it has recognized the force of our argument, and that the Government has relied on the argument in urging successfully that it has the power to

investigate an election even though no complaint has been filed.

The fact that it has been held that the Government can investigate an election about which it has received no complaint indicates that its reliance (Gov. Brief n. 27 pp. 47-48), as an analogy, on cases, such as *National Labor Relations Board* v. *Fant Milling Co.*, 360 U.S. 301 (1959), which delineate the power of the N.L.R.B's General Counsel to expand a charge, is misplaced. For if the analogy were sound it would suggest that the General Counsel, as well as the Secretary of Labor, could investigate a matter without a charge. But he can not. And it would suggest that any person, and not just a union member who has exhausted internal remedies, could file a complaint with the Secretary of Labor, *see National Labor Relations Board* v. *Indiana & Michigan Electric Co.* 318 U.S. 9, 17-18 (1943). But this is clearly not the case. This indicates that the powers of the General Counsel and the Secretary are in no way comparable. The power accorded to either one of them can not be determined by reference to the powers of the other. This is so because the structure of the legislation they administer, and the policies that underlie them, are entirely different.

It is, we believe, the Government's failure to appreciate the balance that Congress struck here that is also responsible for its suggestion (Gov. Brief 48-49) that exhaustion of remedies by a union member was not required in this case because the Government indicated, through a notice to the union after its investigation, that it took the position that the entire general election was unlawful. The purpose of Section 402(a) is to encourage union self-government; and government by the Secretary's suggestion in the form of a threat to take coercive action, rather than through a

process of interaction between the union and its members, may be called any of several things but not self-government. Moreover, it is clear that this argument proves far too much. Since there is no requirement that the Government limit its investigations to elections about which there has been a complaint, this argument, if accepted, would sanction a suit under 402(b) to set aside a union election, about which no member had complained, as long as the Government told the union it believed that the election was unlawful in some respect prior to filing its suit. In short, this argument effectively reads the limitation of Section 402(a) out of this Act.

III

IN NO. 57 THE DISTRICT COURT'S DETERMINATION THAT THE GOVERNMENT FAILED TO PROVE THAT THE ALLEGED VIOLATION AFFECTED THE OUTCOME OF THE ELECTION IS CORRECT

Section 402(c)(2) of the Act requires the Government to prove that the alleged "violation of Section 401 may have affected the outcome of the [challenged] election" in order to be entitled to judicial relief. In No. 57 the District Court ruled that the Government had failed to sustain this burden (57 R. 47). The Third Circuit did not review this portion of the District Court's decision; nevertheless, the Government suggests (Gov. Brief 49-52) that this Court should decide whether the District Court was correct as to this aspect of the case in the event it holds that No. 57 is not moot. Given the posture of the case, the normal procedure would be for this Court to reject the Government's suggestion and to simply remand the case to the court below for a decision on the merits. However, since

the Government has briefed the question we now turn to a brief consideration of it.

The final wording of what was to become Section 402(c)(2) was arrived at in the drafting of Section 302(c) of S. 1555 (86th Cong. 1st Sess.) by the Senate Labor Committee. The Committee added the modifying words "may have" to the phrase "If . . . the court finds . . . that the [alleged] violation affected the outcome . . ." Senate Report No. 187, pp. 46-50, Leg. Hist. 780 explains the meaning of the language chosen in the following words:

> "Section 302(c): Provides for a trial of the issues in proceedings or action brought under this section by the district court. If the court, upon a preponderance of this evidence, finds that (1) an election was not held within the time prescribed by section 301, or (2) a violation of section 301 did or reasonably could have been expected to affect the result of an election, the court is to declare the election void and direct the holding of a new election under supervision of the Secretary of Labor."

See also Cong. Rec. 19765, Senate, Sept. 14, 1959, Sen. Goldwater, Leg. Hist. 838-839.

In *Locals 410, etc. Operating Engineers, supra,* 366 F.2d at 443, the Second Circuit, the only Court of Appeals which has passed on this point, set out the following interpretation of the purport of the language chosen:

> "The proviso was intended to free unions from the disruptive effect of a voided election unless there is a meaningful relation between a violation of the Act and results of a particular election. For example, if the Secretary's investigation revealed that 20 percent of the votes in an election had been tampered with, but that all officers had won by an 8-1 margin, the proviso should prevent upsetting the election. Compare *Wirtz* v. *Local 11, International Hod Carriers,* 211 F. Supp. 408 (W.D. Pa., 1962). But in the cases at bar, the alleged violations *caused the exclusion of willing*

> *candidates* from the ballots. In such circumstances, there can be no tangible evidence available of the effect of this exclusion on the election; whether the outcome would have been different depends upon whether the suppressed candidates were potent vote-getters, whether more union members would have voted had candidates not been suppressed, and so forth. Since any proof relating to effect on outcome must necessarily be speculative, we do not think Congress meant to place as stringent a burden on the Secretary as the district courts imposed here." (emphasis added)

Thus as the discussion relating to election tampering demonstrates the Second Circuit recognized that Section 402(c)(2) was a product of the overall Congressional desire to minimize Government interference with internal union affairs by limiting rerun elections to those cases in which there is a reasonable probability that the alleged violation had a practical effect on the challenged election. In others words, Section 402(c) (2) is part of the general plan of Act which requires the Government to prove, by a preponderance of the evidence, that the challenged election was held under conditions which frustrated the expression of the memberships' desires and not an exception to it. Taking this point into account, as well as the change in language made by the Senate Labor Committee just noted, the Second Circuit then held that if the Government shows that a willing candidate was unlawfully disqualified from the ballot the Government has met the burden of proof imposed on it by Section 402(c)(2). In other words, it freed the Government from the task of making a showing, which it deemed speculative, as to what the results of the election would have been if all willing candidates, who should have been allowed to run, had been allowed to appear on the ballot. We do not believe that the Court of Appeals relaxation of the requirements of Section 402(c)(2) was proper. But the validity of its approach in that regard is not raised by No. 57. However, the Court of Appeals opinion is

plainly correct insofar as it retained the essence of the Congressional desire to limit rerun elections by requiring the Government to prove, as the prime element of its case, that a *willing candidate* was actually disqualified by the unlawful rule in question. This portion of its holdings is sufficient to decide the issue presented in No. 57. The burden of proof thus placed on the Government is plainly consistent with the intent of Congress since it can not be deemed to sanction speculation as to the shape of events which never took place. Moreover the rule suggested is entirely rational since there is plainly no sense in overturning an election on the basis of an allegedly unlawful rule if that rule did not operate to disqualify a single person, who had evidenced a desire to run for office, from the ballot.

In No. 57, the Government did not meet the minimal standard set for it by the Second Circuit's decision in the *Locals 410, etc. Operating Engineers* case. The District Court found that the Glass Bottle Blower's 75% meeting attendance requirement, did not violate Section 401(e) standing alone but was unlawful when combined with Local 153's rule which severely limited excused absences. The illegality found thus inhered in the two rules taken in combination (57R.44). Given this basic finding it was incumbent upon the Government in order to satisfy the requirement of Section 402(c)(2) to prove that some prospective candidate was disqualified from the ballot despite the fact that he had attended 75% of the meetings other than those for which he had a valid excuse. However, the Government only presented evidence concerning one potential candidate, and that candidate had not attended 75% of the meetings other than those for which he had a valid excuse (57R.47).

Following the pattern set in its arguments on the first two issues presented, the Government's argument on this point seeks a result which would read the limitations of

Section 402(c)(2) out of the Act in cases in which a union rule governing eligibility to be a candidate for office is in issue. In effect the Government claims that such rules should be judged *in vacuo* and that the question of whether they had a practical effect on the conduct of the challenged election should be ignored. For the Government argues (Gov. Brief 50-52) that if a rule would have the effect of disqualifying a large percentage of the membership it "may have affected" the outcome of the election even though not a single one of the "disqualified" members desired to run for office whether he was eligible or not. The first difficulty with this argument is that such a union rule is not, necessarily, as the Government apparently assumes, an unreasonable rule under Section 401(e) of the Act. As the Second Circuit held in *Hotel, Motel and Club Employees Union, Local 6, supra,* 65 LRRM at 3034, 3035:

> "In deciding the issue of reasonableness we must keep in mind the fact that the Act did not purport to take away from labor unions the governance of their own internal affairs and hand that governance over either to the courts or to the Secretary of Labor. The Act strictly limits official interference in the internal affairs of unions. See, Calhoon v Harvey, 379 U.S. 134 (1964); Gurton v Arons, 339 F.2d 371, (2d Cir. 1964). The Act prescribes only certain basic minima and leaves the area not covered by these minimum prescriptions to the decisions of the unions themselves."
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> * * * * * *
>
> "Turning to the application of these policies to the present case, we hold that it is not self-evident that basic minimum principles of union democracy require that every union entrust the administration of its affairs to untrained and inexperienced rank and file members."
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> * * * * * *
>
> "The Secretary of Labor make much of the fact that only about 1700 [out of 26,000] members of the union are eligible for election to the 31 elective offices. How-

> ever, when this number is combined with the fact that all members in good standing for one year have the opportunity to become eligible for office by getting themselves elected to seats in the four hundred-odd member Assembly, the numbers, per se, do not seem to us to establish unreasonableness."

The second difficulty is that such a rule simply can not be presumed to be one which works a "mass disqualification of candidates" to use the Government's phrase (Gov. Brief 52). Under Article II, Section 1 of the Constitution of the United States any natural born citizen, over 35 years of age, and a resident within the country for 14 years can run for President. It is surely an absurdity to say that all those in the excluded class are candidates for the Presidency and that Article II Section 1 works a mass disqualification of them. If a person is to be considered a candidate for office there must be a showing that he seeks that office, or that he was selected by others as a contestant for that office. If this is not required the term becomes meaningless.

In sum we urge that in order to satisfy the requirement of Section 402(c)(2) the Government must, at the very least, prove that a union member who desired to run for office, i.e. a willing candidate, was prevented from doing so by an unlawful union rule. Since the Government did not make such a showing in No. 57 the decision of the District Court should be affirmed.

CONCLUSION

For the above stated reasons, as well as those presented by the respondents in Nos. 57 and 58, the decisions of the Third and Sixth Circuits, which hold that each of these cases is moot, should be affirmed. Should this Court hold that the cases are not moot, and should it decide to reach the subsidiary questions presented by the Government, the

decisions of the District Courts in both No. 57 and No. 58 should be affirmed.

Respectfully submitted,

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October 1967

APPENDIX A

S. 3751, 85th Cong., 2nd Sess., May 5, 1958:

"Sec. 4(a) A member of a labor organization—

(i) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(ii) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary of Labor within four calendar months after an election alleging the violation of any provision of sections 201, 202 or 203 (inclding violation of the constitution and bylaws of the labor organization). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) If the Secretary upon investigation of the complaint finds probable cause to believe that violation of this Act has occurred and has not been remedied, he shall, within thirty days of filing of such complaint, and without disclosing the identity of the complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election under the supervision of the Secretary and in accordance with the provisions of this Act."

S. 3974, 85th Cong., 2nd Sess., June 17, 1958:

"Sec. 302. (a) A member of a labor organization—

(i) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(ii) who has invoked such available remedies without obtaining a final decision within four calendar months after their invocation.

may file a complaint with the Secretary of Labor within one calendar month thereafter alleging the violation of any provision of section 301 (including violation of the constitution and bylaws of the labor organization). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and if he finds probable cause to believe that a violation of this Act has occurred and has not been remedied, he shall, within thirty days of filing of such complaint, or as soon thereafter as possible but in no event after sixty days, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election under the supervision of the Secretary and in accordance with the provisions of this Act and such rules and regulations as the Secretary may prescribe."

S. 1555, 86th Cong., 1st Sess., April 15, 1959:

"Sec. 302. (a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their innovation.

may file a complaint with the Secretary of Labor within one calendar month thereafter alleging the violation of any provision of section 301 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal

of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The service of summons, subpena or other legal process of a court of the United States upon an officer or agent of a labor organization in his capacity as such shall constitute service upon the labor organization. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization."

The LMRDA as enacted:

"Sec. 402. (a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall

be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization."